

¹ The regulations governing this proceeding require that a complaint be “signed by the Director of the [OPR] or a person representing the Director of the [OPR] under § 10.69(a)(f),” which further provides that an “attorney or employee of the [IRS] representing the Director of the [OPR] in a proceeding under this part may sign the complaint . . . on behalf of the Director of the [OPR]. 31 C.F.R. §§ 10.62(a)(1). Complainant has established that Russ E. Eisenstein is an IRS attorney and the “designated representative of the Director.” Compl. At 2; 31 C.F.R. §§ 10.62, 10.69(a)(1).

the respondent.” 31 C.F.R. § 10.63(a)(2)(i) (italics added). Complainant did not attach a signed returned receipt as an exhibit to the Complaint, but rather attached a web page print out of the United States Postal Service Tracking Results page showing that the certified mail was “delivered” on May 14, 2009 at 12:03 pm. Compl. Ex. C. Such printout cannot substitute for the specific proof of service prescribed in 31 C.F.R. § 10.63(a)(2)(i).

As to the Complaint sent by first class mail, the rules provide that service via first class mail may be made “*if the certified mail is not claimed or accepted by the respondent or is returned undelivered.*” 31 C.F.R. § 10.63(a)(2)(ii) (italics added). The lack of a returned post office receipt signed by Respondent, when combined with the United States Postal Service Tracking Results page showing that the certified mail was “delivered,” adequately evidences that the certified mail was not claimed or accepted by the respondent. As such, the declaration asserting the mailing of the Complaint by first class mail on May 12, 2009, constitutes adequate proof of service.

A complainant must “name the respondent, provide a clear and concise description of the facts and law that constitute the basis for the proceeding,” be signed by the OPR Director, and “specify the sanction sought.” 31 C.F.R. §§ 10.62(a) and (b). It also must “notify the respondent of the time for answering the complaint,” and state the names and addresses of the Administrative Law Judge with whom an answer must be filed and the OPR representative with whom a copy must be filed. 31 C.F.R. § 10.62(c). Importantly, a complaint must also announce to the respondent “that a decision by default may be rendered against the respondent in the event an answer is not filed as required.” *Id.*

The Complaint stated:

Pursuant to 31 C.F.R. § 10.64. Respondent’s answer to this complaint must be filed with Honorable Susan L. Biro, Chief Administrative Law Judge, U.S. Environmental Protection Agency, Office of Administrative Law Judges, Mail Code 1900L, 1200 Pennsylvania Ave., N.W., Washington, D.C. 20460, and a copy served on Russ E. Eisenstein, Attorney, Office of Chief Counsel, as designated representative of the Director, Office of Professional Responsibility, within thirty (30) calendar days from the date of service. The designated representative’s address is as follows: Office of Chief Counsel, Area Counsel (GLS), 200 West Adams Street, Suite 2400, Chicago, IL 60606-5232. Failure to file an answer to the complaint may result in a decision by default being rendered against Respondent.

The record evidences that Respondent has not answered the Complaint or requested additional time to do so. Decl. At 2-3; Mem. at 2-3. In regard thereto, the rules provide in pertinent part as follows:

Failure to file an answer within the time prescribed (or within the time for answer as extended by the Administrative Law Judge), constitutes an admission of the allegations of the complaint and a waiver of hearing, and the Administrative Law Judge may make the decision by default without a hearing or further procedure.

31 C.F.R. § 10.64(d).

Therefore, pursuant to 31 C.F.R. § 10.64(d), Respondent's failure to file an answer within the time prescribed constitutes an admission of the allegations of the Complaint and a waiver of a hearing. Thus, a decision by default may be entered against Respondent.

The Complainant moves the undersigned to issue such a decision by default disbarring Respondent from further practice before the IRS for disreputable conduct in violation of 31 C.F.R. § 10.51(d) in 2001, and 31 C.F.R. § 10.51(f) during 2002-2007,² without further procedure, pursuant to 31 C.F.R. § 10.64(d). I hereby enter a decision by default based upon the entire record and the following Findings of Fact and Conclusions.

FINDINGS OF FACT

1. At all times material hereto, Respondent was an attorney and a certified public accountant, as defined in 31 C.F.R. §§ 10.2(a)(1) and (2) respectively, and engaged in practice before the IRS as defined in 31 C.F.R. § 10.2(a)(4), by reason of the provisions of 5 U.S.C. §§ 500(b) and (c), and 31 C.F.R. §§ 10.3(a) and (b). Respondent is subject to the disciplinary authority of the Secretary of the Treasury and the OPR. Respondent's last known address of record with the IRS is Address 1.

2. For the tax year ending December 31, 2001, Respondent failed to file timely a Federal individual income tax return. Respondent failed to file timely a Federal individual income tax return. Respondent failed to pay timely the underlying tax liability and the tax penalties that were

² These regulations contain almost identical language. In July 2002, 31 C.F.R. § 10.51(d) was revised and relocated to 31 C.F.R. § 10.51(f). The former, applicable to Respondent's violations in 2001, provides that disreputable conduct is:

Willfully failing to make a Federal tax return in violation of the revenue laws of the United States, or evading, attempting to evade, or participating in any way in evading or attempting to evade any Federal tax or payment thereof, knowingly counseling or suggesting to a client or prospective client an illegal plan to evade Federal taxes or payment thereof, or concealing assets of himself or another to evade Federal taxes or payment thereof.

31 C.F.R. § 10.51(d); Circular No. 230 (Rev. 7-94). The regulation applicable to Respondent's violations from 2002-2007. 31 C.F.R. § 10.51(f), similarly provides that disreputable conduct is:

Willfully failing to make a Federal tax return in violation of the revenue laws of the United States, willfully evading, attempting to evade, or participating in any way in evading or attempting to evade any assessment to evade any assessment or payment of any Federal tax, or knowingly counseling or suggesting to a client or prospective client an illegal plan to evade Federal taxes or payment thereof.

31 C.F.R. § 10.51(f); Circular No. 230 (7-2002). After another revision effective September 26, 2007, this regulation has been relocated to 31 C.F.R. § 10.51(a)(6), and provides that disreputable conduct is:

Willfully failing to make a Federal tax return in violation of the Federal tax laws, or willfully evading, attempting to evade, or participating in any way in evading or attempting to evade any assessment or payment of any Federal tax.

31 C.F.R. § 10.51(a)(6); Circular No. 230 (4-2008).

assessed against him for the 2001 tax year. Respondent is currently delinquent to the U.S. Treasury in the amount of \$18,810.39 for his underlying Federal Individual income tax liability, interest on that tax liability, and accrued penalties for the 2001 tax year.

3. For the tax year ending December 31, 2002, Respondent failed to file timely a Federal individual income tax return. Respondent failed to pay timely the underlying tax liability and the tax penalties that were assessed against him for the 2002 tax year. Respondent is currently delinquent to the U.S. Treasury in the amount of \$19,145.84 for his underlying Federal individual income tax liability, interest on that tax liability, and accrued penalties for the 2002 tax year.

4. For the tax year ending December 31, 2003, Respondent failed to file timely a Federal individual income tax return. Respondent failed to pay timely the underlying tax liability and the tax penalties that were assessed against him for the 2003 tax year. Respondent is currently delinquent to the U.S. Treasury in the amount of \$16,646.01 for his underlying Federal individual income tax liability, interest on that tax liability, and accrued penalties for the 2003 tax year.

5. For the tax year ending December 31, 2004, Respondent failed to file timely a Federal individual income tax return. Respondent failed to pay timely the underlying tax liability and the tax penalties that were assessed against him for the 2004 tax year. Respondent is currently delinquent to the U.S. Treasury in the amount of \$31,873.27 for his underlying Federal individual income tax liability, interest on that tax liability, and accrued penalties for the 2004 tax year.

6. In total, for the 2001-2004 tax years, and as of April 21, 2008 when the IRS wrote a letter to Respondent, Respondent is delinquent to the U.S. Treasury in the amount of \$86,475.51 for underlying Federal individual income tax liability, interest on that tax liability, and accrued penalties. Compl. Ex. C.

7. For the tax year ending December 31, 2005, Respondent failed to file a Federal individual income tax return.

8. For the tax year ending December 31, 2006, Respondent failed to file a Federal individual income tax return.

9. For the tax year ending December 31, 2007 Respondent failed to file a Federal individual income tax return.

10. Through letters dated October 6, 2006, and November 27, 2006 and April 21, 2008, Complainant advised Respondent in writing of the law, facts, and conduct warranting the issuance of the Complaint, and has been accorded an opportunity to dispute those facts, assert additional facts, and make arguments, in compliance with the regulations at 31 C.F.R. § 10.6(c). Compl. Exs. A-C.

11. Respondent's conduct, as set forth in Findings of Fact 2 through 9, represents willful and disreputable conduct.

CONCLUSIONS

It is well established that there exists within federal agencies the power to regulate those who practice before them. Congress authorized the Secretary of the Treasury to regulate the practice of those persons representing others before the Department of the Treasury in 31 U.S.C.

§ 330. The Secretary of the Treasury has implemented such authority by promulgating regulations at 31 C.F.R. Part 10, which are designed to protect the Department and the public from persons unfit to practice before the IRS. Any practitioner may be disbarred or suspended from practice before the IRS, after notice and an opportunity for a hearing, if the practitioner is shown to be incompetent or disreputable, refuses to comply with any regulation in 31 C.F.R. Part 10, or, with intent to defraud, willfully and knowingly misleads or threatens a client or prospective client. 31 U.S.C. § 330(b); 31 C.F.R. § 10.50(a). As to disreputable conduct, the regulations at 31 C.F.R. § 10.51(f) provide in pertinent part:

Incompetence and disreputable conduct for which a practitioner may be censured, suspended or disbarred from practice before the Internal Revenue Service includes, but is not limited to

* * *

(f) Willfully failing to make a Federal tax return in violation of the revenue laws of the United States, willfully evading, attempting to evade, or participating in any way in evading or attempting to evade any assessment or payment of any Federal tax, or knowingly counseling or suggesting to a client or prospective client an illegal plan to evade Federal taxes or payment thereof.³

Findings of Fact 2 through 9 support a conclusion that Respondent engaged in disreputable conduct within the meaning of 31 C.F.R. § 10.51(d) from Circular 230 (Rev. 7-94), and 31 C.F.R. § 10.51(f) from Circular No. 230 (7-2002), for which he may be disbarred or suspended from practice before the IRS.

Complainant requests the sanction of disbarment. The provision of the rules which addresses decisions by default, 31 C.F.R. § 10.64(d) does not require that the relief requested be granted upon a failure to file an answer, but only that such failure constitutes an admission of all of the allegations of the complaint and a waiver of hearing, and that a decision by default may be made without hearing or further procedure. The sanction is to be determined by examining the nature of violations in relation to the purposes of the regulations along with all relevant circumstances, and giving appropriate weight to the recommendation of the administrative officials charged with the responsibility of achieving the statutory and regulatory purposes.

The issue in a disbarment proceeding is essentially whether the practitioner in question is fit to practice. *Harary v. Blumenthal*, 555 F.2d 1113, 1116 (2d Cir. 1997). A certified public accountant's failure to file tax returns for three consecutive years has been held to constitute grounds sufficient for disbarment. *Poole v. United States*, No. 84-0300, 1984 U.S. Dist. LEXIS 15351 (D.D.C. June 29, 1984). The court in *Poole* stated, "willful failure to file tax returns, in violation of Federal revenue laws, in [sic] dishonorable, unprofessional, and adversely reflects on the petitioner's fitness to practice. This is particularly true in a tax system whose very effectiveness depends upon voluntary compliance." 1984 U.S. Dist. LEXIS 15351 at 8. In *Owrutsky v. Brady*, No. 89-2402, 1991 U.S. App. LEXIS 2613 (4th Cir. 1991), an attorney was disbarred for willful failure to file timely tax returns for six consecutive years, albeit he had no tax liability for any of those years. In that case, the appellate court noted:

The ALJ concluded that Owrutsky knew he was required to file returns, knew when they were required to be filed, and knew they were required to be timely

³ This version of the regulation applies to violations occurring on or after July 26, 2002 and before September 26, 2007. 31 C.F.R. § 10.51(f). Circular No. 230 (7-2002); Circular No. 230 (4-2008).

filed. He held that Owrrutsky's failure to timely file tax returns for six consecutive years was "clearly a voluntary, intentional violation of a known legal duty."

Also:

[T]he ALJ [found] that Owrrutsky, an experienced practicing attorney, was fully aware that he had a legal duty to timely file returns regardless of his tax liability.

Id at 3-5

Those same findings can be made in this case. Respondent, Dean E. Solovy, is both an attorney and a certified public accountant, who sought and obtained eligibility to practice before the IRS, and did practice before the IRS. As such, he was and is fully aware of when his tax returns were due to be filed and that he had a legal duty to file his tax returns and pay any tax liability in a timely manner. He failed to do so for the seven consecutive tax years from 2001 through 2007.

Practice before the IRS is a privilege, and one cannot partake of that privilege without also taking on the responsibilities of complying with the regulations that govern such practice. Disbarment is imposed in furtherance of the IRS' regulatory duty to protect the public interest and the Department by conducting business with responsible persons only. Respondent's willful failure to follow the requirements of 31 C.F.R. Part 10, reflected by his failure to discharge known obligations over a period of seven years shows a disregard of the standards established for the benefit of the IRS and the public. Disbarment is commensurate with the seriousness of the violations found therein.

ORDER

It is hereby **ORDERED** that Respondent **DEAN E. SOLOVY**, an attorney and certified public accountant, be **disbarred from practice before the Internal Revenue Service**.

Susan Biro
Chief Administrative Law Judge⁴

Date: July 14, 2009
Washington, D.C.

Pursuant to 31 C.F.R. § 10.77(b), this Decision and Order may be appealed to the Secretary of the Treasury within thirty (30) days from the date of this Decision. This appeal must be filed in duplicate with the Director of the Office of Professional Responsibility and shall include exceptions to the Decision of the Administrative Law Judge and supporting reasons thereof, as more fully set forth in 31 C.F.R. § 10.77(a).

⁴ This decision is issued by the Chief Administrative Law Judge of the United States Environmental Protection Agency. The Administrative Law Judges of the Environmental Protection Agency are authorized to hear cases pending before the United States Department of the Treasury, pursuant to an Interagency Agreement effective July 20, 1999.